IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4993 of 1985
with
SPECIAL CIVIL APPLICATION No 7 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DILSHAD SAIYED

Versus

STATE OF GUJARAT

Appearance:
MR AR SHAIKH with MR IS SUPEHIA for Petitioner No.1
MR KM PARIKH, AGP for Respondent No. 1
NOTICE SERVED for Respondent No. ,3
RULE SERVED BY DS for Respondent No. 2

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 11/07/2001

ORAL COMMON JUDGEMENT

These two petitions relate to the similar orders of termination and similar contentions have been raised on behalf of the parties. Hence, both the petitions are being disposed of by this common judgement.

2. The petition being Special Civil Application No. 4993 of 1985 has been filed by Smt.Dilshad Saiyed for

declaring that the order dated 14th March, 1985 terminating the services of the petitioner is illegal, erroneous, inoperative, for quashing and setting aside the said order and for a direction to the respondents to continue the petitioner in service as Linen Keeper all throughout as if the termination order has not come into effect.

3. While the petition being Special Civil Application No.7 of 1987 was filed by Liyaquatalikhan Hasankhan Batangi and Indumatiben Ghalabhai Kantharia for quashing and setting aside the judgment and orders dated 19th May, 1986 passed by the Gujarat Civil Services Tribunal, Gandhinagar in Appeal No.82 of 1985 and Appeal No.84 of 1985, at Annexures 'I' and 'J' respectively; and for quashing and setting aside the impugned orders of termination dated 14th March 1985 at Annexure 'H' to the petition and for a direction to the respondent-authorities to consider the petitioners for the post of Linen Keeper and to allow the petitioners to perform duties and responsibilities as Linen Keeper and to accord all the service benefits like salaries, difference of salaries, seniority and increments etc.

4. The two petitioners of the Special Civil Application No.7 of 1987 were appointed to be the Linen Keeper. The order dated 20th July, 1981 shows that Petitioner No.1 - Liyaquatalikhan was given temporary (probationary) appointment on the pay scale of Rs.380-12-440-15-470-EB-15-560, at Rs.380/- in the beginning alongwith the allowances sanctioned by the Government, as per the existing Rules purely on temporary basis for one year. That was subject to ten conditions. Condition No.3 says that if the petitioner desires to submit his resignation, and if his service is less then one year, seven days, and if it is more than one year, then one month's notice in writing will have to be given. Conditions No.4 says that since the appointment is on temporary basis, he was liable to be relieved from service as per the Rules by giving notice, if the need arises, without any intimation or without showing cause.

5. Similarly, in the petition being Special Civil Application No.4993 of 1985 Smt.Dilshad Saiyed was appointed for one year by order dated 20th July, 1991 on purely temporary basis subject to the conditions mentioned in the order itself. It is also stated in the Order dated 20th July, 1991 that in the case of resignation by the petitioner, if the service is less than one year, then seven days's notice and if the service is more than one year, then one month's notice

would be required to be given and that the appointment was being temporary and it could be terminated without assigning any reasons and without any information at any time after giving necessary notice according to rules.

6. By order dated 17th July, 1982, the probation period of the petitioners - Smt.D.N.Saiyed and Mr.Batangi was extended for one year or till the Recruitment Rules are finalized, whichever is earlier of the two accordingly.

7. By letter dated 26th July, 1982, the tenure of the service of Smt.D.N.Saiyed was extended for a period of one year or till the Recruitment Rules are finalized, whichever is earlier.

8. By order dated 26th July, 1983, the tenure of the service of the petitioner-Smt.D.N.Saiyed was extended till further orders or till alternative permanent arrangements are made, whichever is earlier with a break of one day in service and information was sent to the petitioner by letter dated 8/8/1983 and that for the vacancies, the names are called for from the government approved institutions and those candidates would be called for personal interview; if the petitioner was anxious to put his candidature for the same, she was required to apply along with the testimonials and certified copies within seven days so that she could be called for interview. The interview was held on 15/12/1983. It appears from the letter dated 20/12/1983 that she passed the interview and she was selected, hence, she was again appointed for a period of one year on purely temporary basis on probation with a specific pay scale subject to the conditions as laid down in the initial appointment letter dated 20th July, 1981. On 14/3/1985, the services of the petitioners were directed to be continued till further orders on temporary basis on probation and the extension was subject to the conditions of initial appointment. On the same day i.e. 14/3/85, another order at Annexure 'G' was passed and handover to the petitioner wherein, it is pointed out that the services of the petitioner were no longer required and her services were terminated with effect from the same day i.e. 14th March, 1985, after office hours and the orders were passed for payment of one month's pay as per the rules in lieu of the notice and she was also directed to handover the charge to the specified officer.

9. The Recruitment Rules have also been annexed at Annexure 'I', wherein Conditions 3(c) and (d) lay down the necessary qualifications for Linen Keeper, Class-III;

for the candidate who have passed Diploma Course in Tailoring from the Institution recognized by the Government of Gujarat; and having two years experience of Tailoring. As the services of the petitioner was terminated by the letter dated 14/3/85, the petitioner made a representation to the Principal Secretary, Health and Family Welfare Department, Sachivalaya, Gandhinagar on 18/3/85. In the month of April, 1985 she also sent the representation to the Minister of Health but she had not received any reply in that respect.

10. The affidavit-in-reply has been filed by the Director, Employees State Insurance Scheme stating therein that the petitioner did not possess requisite qualifications prescribed in the Recruitment Rules. The institution from which the petitioner passed the Tailoring Course in Women and Children Garments was not a recognized institution, hence, the petitioner was not having the requisite qualifications. The petitioner had passed the Tailoring Course in Women and Children Garments from the Technical Examination Board which is an institute recognized by the Government but she has not passed the requisite Diploma Course.

11. Affidavit-in-rejoinder was also filed by the petitioner-Smt.Saiyed, wherein it is stated that the petitioner was appointed without any condition to the effect that she was to be interviewed and selected again after the Recruitment Rules came into force. For all practical purposes, the petitioner was appointed initially on regular basis in a permanent post on a probation for one year. The Recruitment Rules came into force from 24th June, 1983 and they are not with retrospective effect and hence, those employees who were recruited earlier could not be subjected to any fresh selection. Even the petitioner volunteered to appear at the interview as per the Circular dated 8.8.1983. In case she had not appeared in the interview and selected, the services of the petitioner will have to be continued on regular basis like others as one Kum.Shreya Babulal Shah who was appointed by the letter dated 15/7/1974. Similarly, Shardaben Patel was appointed as Linen Keeper by order dated 22nd April, 1977 and she is continued in service having the same qualification as the petitioner has. In the judgement passed by the Tribunal in Appeal No.82 of 1985, it has been observed that no institute has been recognized for a Diploma course in Tailoring mentioned in the Recruitment Rules for the post of Linen Keeper. Various posts of Linen Keeper are still lying vacant because no person with the requisite qualifications as per Rules is available.

12. The Further Affidavit-in-reply was also filed by the Deputy Director of ESIS, wherein it is stated that the post of Linen Keeper is Class-III post which falls under the category of subordinate service and the recruitment to the said post is required to be made in accordance with the provisions contained in the aforesaid rules and other Recruitment Rules framed by the Government known as Linen Keeper, Class-III (Employees State Insurance Scheme) Recruitment Rules, 1983. The appointment of the petitioner was made purely on temporary basis and her service was liable to be terminated without assigning any reason till the availability of suitable candidates selected as per Recruitment Rules framed by the Government. It is stated that the applicant was not having the requisite qualifications as provided in the Recruitment Rules. The persons who were not having requisite qualifications similarity situated to the petitioner one Smt.I.G.Kantharia is wife of one Shri G.K.Kantharia who was working at the relevant time as Office Superintendent, in Establishment Branch of the Directorate and another person N.K.Kantharia was Administrative Officer, in the Administrative Office, who was the real brother of the said petitioner's husband. Shri L.H.Batangi is the real brother of A.H.Pathan who is Officer Superintendent in the Office of the Director. Even though the petitioner was appointed temporarily she was continued in the said post by issuing temporary orders from time to time without going for the recruitment of eligible candidates. On the instruction of the Government Vide its confidential letter dated 21st February, 1985, the services of all persons who were not having the requisite qualifications including the petitioner in terms of appointment orders were discontinued as such the impugned order was passed in accordance with law and same is legal, valid and proper. As the petitioner was not having the requisite qualifications, she could not be permitted to continue as regular employee and as the appointment was not made in accordance with provisions contained in Recruitment Rules, she was discontinued from the service as per the terms and conditions of the appointment order in accordance with law. The petitioner-Smt.Dilshad Saiyed came directly in this Court to challenge the said impugned orders.

13. Heard the Ld.Counsel for the parties and perused relevant papers on record. The contention on behalf of the petitioner is that when the petitioner was appointed at the time when earlier Recruitment Rules were in

existence, and as the two persons stated-above were appointed as Linen Keeper under the old Recruitment Rules, they have been continued in their service. As such the service of the petitioner is required to be continued and the authority has committed error on the face of record in passing the impugned order. The respondents had extended the tenure of petitioner by giving artificial break of one day in service. That is not permitted in the eye of law. It is also contended that after the interview, she was found eligible for appointment and she was legally recruited after complying with the conditions of the existing new Recruitment Rules. Termination order is not based on non-satisfactory performance of the petitioner and she had been passed only on the ground that the petitioner was not having the requisite qualifications as per the Recruitment Rules which came into existence afterwards and the Recruitment Rules have no retrospective effect. Hence, they are not applicable to the appointment made for the petitioner after the order of appointment for the probation for one year vide letter dated 20th December, 1983. The respondents passed the order dated 14th March, 1985 making the probation period continued. First of all, that order was passed only in order to show that the petitioner was on probation and she may not claim her right for the post on regular basis as the probation period of one year had already expired on 20th December, 1984. Hence, they passed the order dated 14th March, 1985 making the service tenure of the petitioner on probation. On the same day, within eight hours the performance of the petitioner cannot said to be unsatisfactory in order to pass the termination order. On the same day, i.e.14th March, 1985 termination/ reversion order was passed on the direction of Deputy Director of the Department concerned by letter dated 21st February, 1985. As such the impugned order is illegal and is violative of the principle of natural justice as no opportunity of hearing was given to her before passing the impugned order. The petitioner was being treated as temporary and as per Rule 30(d)(a) of BCS Rules, 1959, one month's pay and allowance in lieu of the notice was paid to the petitioner. The said provisions are applicable only to the temporary Government servant. Even according to the respondents, the petitioner was temporary servant. Hence, she is protected under Article 311 of the Constitution of Indian and before passing the impugned order an opportunity of hearing is required to be given to the petitioner. As such the order passed by the respondent is illegal, null and void and violative of the principle of natural justice.

14. On the contrary the Ld.A.G.P. contended that the petitioner had not possessed the requisite qualifications as she is not possessing the Diploma in Tailoring from the institutions recognized by the Government of Gujarat. The petitioner was appointed on probation, hence, she has no right at all to claim for the post on any ground. It is further contended that the petitioner had got the Diploma in Tailoring from the Ideal Tailor and Cutter Institute, Ahmedabad which has been recognized only for the Certificate Courses and not for Diploma Courses. Hence, on the basis of the certificates issued by the institute, it can only be said that the petitioner is having the Certificate in Tailoring, but it cannot be said that she has the Diploma in Tailoring. Such Diploma Courses in Tailoring are required to be issued by the institutions recognized by the State of Gujarat and the Ideal Tailor and Cutter Institute, Ahmedabad in which the petitioner had undergone Diploma Course does not come within purview of the existing Recruitment Rules. Hence, she was not accepted by the department as Diploma issued by the institute which was not recognized by the Government of Gujarat. Thus, the petitioner was not having requisite qualifications. It is also submitted that the petitioner's appointment was made due to favouritism and nepotism. As such the petitioner cannot be treated as appointed and selected in accordance with law.

15. Ld.A.G.P. also contended that the present matter was previously heard and decided by the Division Bench of this Court on 12th April, 1992 and the petitions of the petitioners were dismissed by this Court. As the matter has already been concluded by the Division Bench, this Court cannot hear and give inconsistent findings. In this respect, I may point out that the order dated 12th April, 1982 passed by the Division Bench has already been recalled by this Court by order dated 22nd February, 1993. In case the order has already been recalled by the Division Bench itself, the matter can be heard again and the same can be decided afresh.

16. The main thrust of the respondents' Counsel is that the petitioner was not possessing the requisite qualifications as per the Recruitment Rules. The Recruitment Rules have been annexed at Annexure 'I'. The relevant Rule (3)(c) requires that the candidate must pass Diploma Course in Tailoring from the Institution recognized by the Government of Gujarat. It appears from the material on record that the petitioner obtained the Diploma in Tailoring from Ideal Tailor and Cutter Institute, Ahmedabad but that institute has been

recognized only for the Certificate Course by the State Government, but the institute has awarded the Diploma in Tailoring to the petitioner. According to the petitioner, there is no institute in Gujarat State where the Diploma Course in Tailoring is conducted and the institute from which the petitioner obtained Diploma in Tailoring is the only institute to award the Diploma in Tailoring. For this purpose, this Court required the exact information from the Ld.Counsel as to whether there is any institute in the Gujarat State which has been recognized by the State Government for Diploma Course in Tailoring.

17. Another affidavit-in-reply has been filed by the Director of Medical Services, E.S.I. Scheme, Ahmedabad, wherein it is stated, "I say that as per my information and knowledge from the available records, there is no institution which has been recognized by the State Government for Diploma Course in Tailoring but as per the observation made by the Tribunal in para 4 of its judgement in Appeal No.82/85, as per the evidence adduced by the representatives of the Technical Education that the Ideal Tailor & Cutter Institute was recognized for 5 certificate courses which was not recognized for conferring any diploma".

18. The Ld.A.G.P. could not point out from any material that there is any institute in the State of Gujarat which has been recognized by the State Government for Diploma Course in Tailoring. It appears that the selection committee approved the Diploma Certificate issued by the Ideal Tailor and Cutter Institute, Ahmedabad as genuine diploma certificate. For the Diploma Course in Tailoring as there is no institution recognized by the State Government in Tailoring in the State of Gujarat, if such Diploma Certificate has been considered to be genuine by the Committee at the time of interview of the petitioner, the State cannot take another stress to say that the petitioner is not having requisite qualifications as per the Recruitment Rules. As per the Recruitment Rules, there is no institute in the Gujarat State recognized by the Government of Gujarat for Diploma Course in Tailoring. Thus, in case the petitioner had been selected on the basis of the Diploma Certificate issued by the Ideal Tailor and Cutter Institute, that selection cannot be said to be illegal and unjustified and the petitioner cannot be treated as not having the requisite qualifications.

19. In the fact and circumstances of the case, the selection committee treated the Diploma Certificate

issued by the Ideal Tailor and Cutter Institute as genuine and the petitioner having requisite qualifications as per the Recruitment Rules cannot be said to be unjustified.

20. In the appointment and selection of the petitioner, the favouritism and nepotism has been adopted and hence appointment and selection of the petitioner cannot be held to be legal but I do not find any substance in this contention as in case the petitioner has been terminated on this ground that her appointment and selection were subject to favouritism and nepotism, then petitioner is required to have an opportunity of hearing on this point and the regular inquiry was required in this respect. But no inquiry has been conducted. Mere statements regarding favouritism and nepotism cannot be accepted.

21. The contention of the Ld.Counsel for the petitioner is that two persons were appointed prior to coming into force of existing Recruitment Rules and they have been allowed to continue, hence, the petitioner is entitled for continuation of service. The petitioner was appointed by letter dated 20th July, 1981. Admittedly, at that time the existence Rules of 1983 were not operative. The petitioner appointment was not made subject to the Recruitment Rules, 1983 but later on the department felt that some proposals have been sent for the new Recruitment Rules. Hence, they made subsequent orders subject to the finalization of the Recruitment Rules and her services was made till finalization of the Recruitment Rules. If the appointment had already been made prior to coming into force the Recruitment Rules of 1983, the petitioner cannot be treated to have been appointed under the new Recruitment Rules, 1983.

22. Moreover, the department has treated the petitioner as the temporary servant under the Rule 30(d)(a) of BCS Rules, 1959 and they provided one month's pay and allowance in lieu of the notice required under Rule 30(d)(c) of the BCS Rules.

23. For the termination of probation, the respondents are not required to give any such notice or pay and allowance in lieu of the notice.

24. In the facts and circumstances of the case as stated above, the petition deserves to be allowed and the impugned order is required to be set aside. The petitioner is treated to be in service, but she cannot claim backwages from the date of the impugned order of

termination inasmuch as, admittedly, the petitioner has not worked for that period. Secondly, even if it is assumed that her services is directed to be continued notionally, then the petitioner would be entitled for the salary and other benefits from the date of this Court's order.

25. In view of the facts and circumstances of the case as stated above, her service is directed to continue notionally and accordingly the petition is allowed and impugned order dated 14th March, 1985 is quashed. The respondents are directed to consider the petitioner in continue in service notionally. They are further directed to give them charge on respective post within one month from the presentation of a copy of this order or the receipt of writ issued by this Court.

26. It is further observed that the petitioner is entitled for all benefits except the backwages.

27. The Ld.Counsel for the respondent submitted that the petitioner-Mr.L.H.Batangi (in Special Civil Application No.7 of 1987) has not completed the Certificate Course in Tailoring and Cutting conducted by Technical Examination Board, Gujarat State as per Rules notified on 25th May, 1989. In case the petitioner-Mr.L.H.Batangi has not completed the Certificate Course in Tailoring which could not be conducted by the Technical Education Board, Gujarat State, it is open to the respondents to send him to the appropriate institute.

Rule is made absolute to the aforesaid extent.
No order as to costs.

(Kundan Singh, J)
'Bhavesh'